No. 07-237

In the Supreme Court of the United States

MIGUEL ANGEL CEBALLO, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that it lacked jurisdiction to review the Board of Immigration Appeals' denial of petitioner's request for a discretionary waiver of removal under 8 U.S.C. 1182(c) (1994).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-7a) is not published in the Federal Reporter but it is available in 184 Fed. Appx. 28. The opinions of the Board of Immigration Appeals (Pet. App. 10a-12a) and the immigration judge (Pet. App. 13a-28a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 23, 2006. A petition for rehearing was denied on May 23, 2007 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on August 17, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under former Section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(c) (1994), a

permanent resident alien with "a lawful unrelinquished domicile of seven consecutive years" could apply for discretionary relief from deportation. See *INS* v. *St. Cyr*, 533 U.S. 289, 295 (2001). The applicant for relief bore the burden of demonstrating that his application merited favorable consideration. *In re Marin*, 16 I. & N. Dec. 581, 583-585 (B.I.A. 1978). When considering a Section 212(c) application, an immigration judge (IJ) "must balance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented in his behalf to determine whether the granting of section 212(c) relief appears in the best interests of this country." *Id.* at 584.

In 1996, Congress repealed 8 U.S.C. 1182(c) (1994), and replaced it with 8 U.S.C. 1229b, which provides for a new form of discretionary relief known as cancellation of removal. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 304, 110 Stat. 3009-597. Relief under former Section 212(c) nonetheless remains available for certain aliens, such as petitioner, whose convictions were obtained through a plea agreement prior to the enactment of IIRIRA and who would have been eligible for relief under the law then in effect. See *St. Cyr*, 533 U.S. at 314-326.

2. Since 1996, the INA has barred federal-court review of certain decisions made by the Attorney General in immigration cases. See IIRIRA § 306, 110 Stat. 3009-607. As pertinent here, the INA provides:

> [N]o court shall have jurisdiction to review * * * any * * * decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or

> the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

8 U.S.C. 1252(a)(2)(B)(ii).[1]

In 2005, Congress qualified this jurisdictional bar by providing:

> Nothing in subparagraph (B) or (C), or in any other provision of this Act (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 106(a)(1)(A)(iii), 119 Stat. 310 (8 U.S.C. 1252(a)(2)(D) (Supp. V 2005)).

3. Petitioner is a native and citizen of Colombia who entered the United States in 1987. Pet. App. 13a. Over a period of approximately three months, petitioner sold cocaine to customers of a local bodega in New York City. *Id.* at 18a. During that time, petitioner "work[ed] three days a week, six hours a day, selling drugs in th[e] bodega." *Id.* at 18a-19a. In August 1995, petitioner was convicted in state court of attempted criminal sale of cocaine in the third degree, in violation of N.Y. Penal Law § 110 (McKinney 1998) and § 220.39 (2000). Pet. 3. He was sentenced to 90 days of imprisonment and five years of probation. *Ibid.*

The Immigration and Naturalization Service initiated removal proceedings, charging petitioner with

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[1] The phrase "this subchapter" refers to Title 8 of the United States Code, Chapter 12, subchapter II, which is codified at 8 U.S.C. 1151-1378. See *Van Dinh* v. *Reno*, 197 F.3d 427, 433 (10th Cir. 1999).

removability based on his conviction for a controlled substance offense, which is an aggravated felony. Pet. App. 10a, 13a; see 8 U.S.C. 1227(a)(2)(A)(iii) and (B)(i).[2] Petitioner did not challenge removability, but he sought a discretionary waiver of removal under former Section 212(c). Pet. App. 10a, 14a. The IJ found petitioner removable as charged. *Id.* at 14a. The Board of Immigration Appeals (BIA) affirmed the IJ's finding of removability and held that petitioner was statutorily ineligible for Section 212(c) relief. A.R. 401. After a federal district court determined that petitioner was eligible to apply for a Section 212(c) waiver, the BIA remanded petitioner's case to permit him to seek that relief. *Id.* at 399.

4. On remand, the IJ denied petitioner's application for a Section 212(c) waiver. Pet. App. 13a-28a. Applying the BIA's precedent in *In re Marin*, 16 I. & N. Dec. 581 (B.I.A. 1978), and *In re Buscemi*, 19 I. & N. Dec. 628 (B.I.A. 1988), the IJ found that petitioner met the seven-year domicile requirement for a Section 212(c) waiver, but he concluded that petitioner did not satisfy his burden of demonstrating that his application warranted a favorable exercise of discretion. Pet. App. 14a-15a.

The IJ performed a lengthy analysis of the positive and negative equities surrounding petitioner's application. He noted several positive equities in petitioner's case, such as the fact that his fiancee and child are United States citizens; that his fiancee, child, mother, and sister depend on him for financial and emotional support; that petitioner has a steady job; and that peti-

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[2] Petitioner was charged with being removable under 8 U.S.C. 1251(a)(2)(A)(iii) and (B)(i). Pet. App. 10a. Those provisions have since been renumbered 8 U.S.C. 1227(a)(2)(A)(iii) and (B)(i). IIRIRA § 305(a)(2), 110 Stat. 3009-598.

tioner would likely face "substantial adjustment problems" if removed to Colombia after spending over a decade in the United States. Pet. App. 15a-27a. The IJ determined that those positive equities "may be considered * * * unusual or outstanding equities." *Id.* at 27a.

On the other hand, the IJ also noted numerous negative equities, including that petitioner had starting selling cocaine just after finishing a term of probation for a trespassing offense; that petitioner had exhibited a "conscious disregard[]" about the negative effects of cocaine; and that petitioner "downplay[ed] the seriousness of the offense and * * * the extent of his involvement." Pet. App. 19a-21a, 25a-26a. Moreover, the IJ "doubt[ed]" that petitioner actually had been rehabilitated, because his family members' testimony "had been shaded or tailored" to exaggerate the positive equities, and "so many of the equities came into existence * * * after [petitioner] had been ordered deported." *Id.* at 27a-28a. After weighing all of those factors, the IJ denied petitioner's application for a Section 212(c) waiver. *Ibid.*

5. The BIA affirmed after reviewing the IJ's determination that petitioner did not warrant a favorable exercise of discretion *de novo*. Pet. App. 10a-12a. The BIA observed that the IJ had applied settled BIA precedent regarding when a Section 212(c) waiver is warranted, "taking into account both the positive and negative equitable aspects of petitioner's application." *Id.* at 11a (citing *In re Marin* and *In re Buscemi*). The BIA determined that the IJ "gave serious consideration to [petitioner's] equities, including his long-term residency in the United States, the presence of his United States child and other relatives in the United States, his em-

ployment history in the United States and his financial contribution to his family." *Ibid.* Further, the BIA noted several negative factors, including the "serious nature of the circumstances surrounding [petitioner's] 1995 conviction"; the fact that "most of [petitioner's] rehabilitative efforts * * * have occurred after the institution of deportation proceedings"; and the fact that petitioner attempted to minimize his crime and testified about his crime in a "less than straightforward" manner. *Id.* at 11a-12a. In light of all of those factors, the BIA agreed with the IJ that petitioner did not merit a favorable exercise of discretion. *Id.* at 12a.

6. The court of appeals denied petitioner's petition for review in two separate decisions. Pet. App. 3a-7a, 8a-9a. In its initial decision, the court of appeals held, *inter alia*, that it "lack[ed] jurisdiction to review the IJ's ultimate discretionary decision denying relief" under former Section 212(c). *Id.* at 9a. The court then requested further briefing regarding "whether the IJ applied the appropriate standard for balancing the equities." *Ibid.*

In its second decision, the court of appeals determined that it lacked jurisdiction to review petitioner's claim that the IJ applied an incorrect legal standard because it was nothing more than an argument "that the IJ erred in balancing the equities of his waiver application." Pet. App. 5a. The court explained that "an IJ's decision to grant or deny a section 212(c) waiver of removal constitutes a discretionary decision" that it "lack[s] jurisdiction to review under 8 U.S.C. § 1252(a)(2)(B)(ii)." *Ibid.* (quoting *Avendano-Espejo* v. *Department of Homeland Sec.*, 448 F.3d 503, 505-506 (2d Cir. 2006)). The court also noted that petitioner's claim that the IJ erred "in balancing the equities" and "in dis-

counting certain equities acquired after [petitioner] had been ordered deported" does not raise a constitutional question or question of law under 8 U.S.C. 1252(a)(2)(D). *Id.* at 6a. Instead, the BIA's and IJ's determination that the equities do not justify a Section 212(c) waiver "is precisely the type of discretionary decision that [the court of appeals] lack[s] jurisdiction to review." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 10-18) that the court of appeals erred in finding that it had no jurisdiction to review his claim that the BIA erred in denying him a discretionary Section 212(c) waiver. The decision below is correct, and it does not conflict with any decision of this Court or any other court of appeals. The decision below is also unpublished and non-precedential. Further review is therefore unwarranted.

1 a. The court of appeals correctly found that it lacked jurisdiction to review petitioner's claim that his situation merited a discretionary Section 212(c) waiver. First, the court of appeals correctly held that 8 U.S.C. 1252(a)(2)(B)(ii) bars petitioner's claim because the BIA's decision to grant or deny a Section 212(c) waiver is a quintessentially discretionary determination. Former Section 212(c) states that qualified aliens "may be admitted in the discretion of the Attorney General," 8 U.S.C. 1182(c) (1994), and no statute or regulatory provision limits that discretion. As the BIA has explained, "Section 212(c) * * * does not provide an indiscriminate waiver for all who demonstrate statutory eligibility for such relief. Instead, the Attorney General or his delegate is required to determine as a matter of discretion whether the alien merits the relief sought, and the alien bears the burden of demonstrating that his

application warrants favorable consideration." *In re Edwards*, 20 I. & N. Dec. 191, 194-195 (B.I.A. 1990). A Section 212(c) waiver determination is thus a "decision or action * * * the authority for which is * * * in the discretion of the Attorney General," over which judicial review is precluded by 8 U.S.C. 1252(a)(2)(B)(ii). Petitioner does not challenge that aspect of the court of appeals' decision. Pet. 15.[3]

Second, the court of appeals correctly found that petitioner's claim does not fall within the statutory exception permitting federal-court review of "constitutional claims or questions of law." 8 U.S.C. 1252(a)(2)(D). Petitioner's claim is that the IJ and BIA "erred in balancing the equities of his waiver application." Pet. App. 5a. As petitioner recognizes (Pet. 15), a Section 212(c) waiver is discretionary, and whether an alien has met his burden that a waiver is justified depends on the facts of his particular case. *In re Marin*, 16 I. & N. Dec. at 584-585. Here, there was no serious dispute about the applicable legal standards; as both the IJ and BIA recognized, settled legal precedent directs the weighing of positive and

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[3] Judicial review of petitioner's claim is also barred under a separate provision, 8 U.S.C. 1252(a)(2)(C). Section 1252(a)(2)(C) states:

> [N]o court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title.

Petitioner was charged as removable because he committed a controlled substance offense that is also an aggravated felony. See 8 U.S.C. 1227(a)(2)(A)(iii) and (B)(i). Although the court below did not rely on Section 1252(a)(2)(C), that provision provides yet another indication that Congress intended to preclude judicial review in a case like this one. See, *e.g.*, *Labbe* v. *Attorney Gen.*, No. 05-5372, 2007 WL 2745713, at *2 (3d Cir. Sept. 21, 2007).

negative equities to determine whether a Section 212(c) waiver is justified in a given case. Pet. App. 11a, 15a. Petitioner's disagreement with the IJ's and BIA's application of settled precedent to the facts of his case does not raise a "constitutional question" or "question of law." Indeed, petitioner's claim is nothing more than a challenge to the BIA's exercise of its broad discretion, and "challenges to the exercise of routine discretion * * * do not raise 'constitutional claims or questions of law.'" *De La Vega* v. *Gonzales*, 436 F.3d 141, 146 (2d Cir. 2006); see Pet. App. 5a-6a.

b. Petitioner claims that he has raised a "constitutional claim[] or question[] of law" by alleging that "the IJ employed a legally erroneous standard" by "discounting * * * petitioner's equities * * * [that] improved or occurred after he was placed in deportation proceedings," and that new legal standard "deprived [him] of Due Process." Pet. 5-6, 9, 11-18. Petitioner's attempt to recast his disagreement with the IJ's and BIA's fact-bound determination as a constitutional or legal question is unavailing, because petitioner cannot present a colorable constitutional claim or question of law.

As the court of appeals recognized, petitioner's argument on appeal was that "the IJ erred in balancing the equities of his waiver application." Pet. App. 5a. That is "precisely the type of discretionary decision" that Congress has entrusted to the Attorney General and over which Congress has precluded judicial review under 8 U.S.C. 1252(a)(2). *Id.* at 6a. Indeed, if petitioner's challenge to the BIA's exercise of its statutorily conferred discretion were considered a "constitutional claim[] or question[] of law" under Section 1252(a)(2)(D), that phrase would lose all meaning. See, *e.g.*, *Higuit* v.

Gonzales, 433 F.3d 417, 420 (4th Cir.), cert. denied, 126 S. Ct. 2973 (2006) ("We are not free to convert every immigration case into a question of law, and thereby undermine Congress's decision to grant limited jurisdiction over matters committed in the first instance to the sound discretion of the Executive."). Review is also unwarranted because even if the court of appeals had jurisdiction to review petitioner's claim, the result in this case would be the same, because neither the IJ nor the BIA adopted a new legal rule for evaluating Section 212(c) waiver applications.

Petitioner has no colorable claim that either the IJ or the BIA adopted a new, incorrect legal standard. The IJ did not hold that equities that arise after deportation proceedings commence are irrelevant to a Section 212(c) determination. Rather, he noted that in petitioner's particular case, he doubted petitioner's rehabilitation because petitioner attempted to minimize his crime, was not forthcoming with the court, and appeared to take steps toward rehabilitation only after he had been ordered deported. Pet. App. 27a-28a. The IJ did not purport to adopt a new legal standard, and, as petitioner acknowledges (Pet. 12), he cited the longstanding precedent that everyone agreed framed the inquiry in this case. Pet. App. 15a.[4]

In any event, the BIA performed a *de novo* review of the IJ's ultimate discretionary determination (Pet. App. 10a-12a), and the court of appeals' review was limited to the BIA's decision. See *Belortaja* v. *Gonzales*, 484 F.3d 619, 263 (2d Cir. 2007). Regardless of whether the IJ

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[4] Petitioner hypothesizes (Pet. 16) that the IJ "may actually [have] be[en] * * * thinking of" other legal standards and precedents than those he cited when making his Section 212(c) determination, but there is simply no support in the IJ's opinion for that conjecture.

adopted a new legal rule, the BIA clearly did not hold that petitioner's equities should be "'cut[] off' or 'fr[ozen]' * * * at any set time in the past." Pet. 10. Instead, the BIA considered all of petitioner's equities, including his rehabilitative efforts, his long-term residency, his child and other relatives in the United States, his employment history, his financial contributions to his family, the nature of his crime, and his attempt to minimize his criminal behavior. Pet. App. 11a-12a. Although the BIA gave less weight to rehabilitative efforts that commenced after the institution of deportation proceedings in petitioner's particular case, it applied settled BIA precedent and did not adopt any new rules of law. *Ibid.* The court of appeals thus correctly found that petitioner raised no colorable question of law.

Moreover, "petitioner's attempt to 'dress up' his challenge with the language of 'due process'" is insufficient to establish federal court jurisdiction over his claim. *Avendano-Espejo* v. *Department of Homeland Sec.*, 448 F.3d 503, 505-506 (2d Cir. 2006). As an initial matter, "aliens have no fundamental right to discretionary relief from removal for purposes of due process and equal protection." *Tovar-Landin* v. *Ashcroft*, 361 F.3d 1164, 1167 (9th Cir. 2004). And again, petitioner's invocation of the Due Process Clause does not change the nature of his claim, which "amounts on this record to nothing more than a challenge to the IJ's exercise of his discretion." Pet. App. 6a (internal quotation marks omitted). As the Third Circuit recently explained, the federal courts of appeals "are not bound by the label attached by a party to characterize a claim and will look beyond the label to analyze the substance of a claim" in determining whether a claim is reviewable under Section 1252(a)(2), because "[t]o do otherwise would elevate form over sub-

stance and would put a premium on artful labeling." *Jarbough* v. *Attorney Gen.*, 483 F.3d 184, 189 (3d Cir. 2007).

c. Petitioner has not alleged any disagreement in the federal courts of appeals regarding whether Section 1252(a)(2) authorizes judicial review of a discretionary denial of a Section 212(c) waiver application. To the contrary, several courts of appeals have recognized that a denial of discretionary relief such as a waiver or cancellation of removal or adjustment of status is not reviewable, even when the alien attempts to recast his challenge as legal or constitutional in nature. See, *e.g.*, *Benyamina* v. *Garcia*, 204 Fed. Appx. 622, 625 (9th Cir. 2006) ("A petitioner may not create jurisdiction to review an exercise of section 212(c) discretion by characterizing the exercise as a due process violation."); *Elysee* v. *Gonzales*, 437 F.3d 221, 223-224 (1st Cir. 2006) (because the alien's claim merely "attack[ed] * * * the factual findings made and the balancing of factors engaged in by the IJ," it "d[id] not raise even a colorable constitutional claim or question of law"); *Higuit*, 433 F.3d at 420 (finding no jurisdiction to review alien's claim that the IJ erred in "balanc[ing] [the alien's] positive and negative attributes" because it was "an equitable determination based on factual findings rather than a question of law"). Thus, even if the court of appeals had arguably erred in finding that it had no jurisdiction over petitioner's claim, this Court should deny the petition because petitioner has failed to demonstrate any legal disagreement in the lower courts or any other "compelling reason[]" justifying certiorari review. Sup. Ct. R. 10.

2. a. Petitioner argues (Pet. 7-18) that this Court should grant review because the court of appeals misap-

plied two of its decisions. As an initial matter, those alleged conflicts provide no basis for this Court to grant review, because it is not the Court's task to reconcile intra-circuit conflicts. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957); Sup. Ct. R. 10. If a conflict existed, it should be left for the Second Circuit to resolve.

In any event, the court of appeals' decision does not conflict with either of the decisions cited by petitioner. First, petitioner contends (Pet. 7-10) that the court of appeals misapplied its decision in *Chen* v. *United States Department of Justice*, 471 F.3d 315 (2d Cir. 2006). In *Chen*, the court of appeals explained that Section 1252(a)(2)(D) "deprive[s] [it] of jurisdiction to review decisions under the INA when the petition for review essentially disputes the correctness of an IJ's fact-finding or the wisdom of his exercise of discretion and raises neither a constitutional claim nor a question of law." *Id.* at 329-330. The court further explained, "[t]o determine whether a reviewing court has jurisdiction, * * * [t]he court would need to determine, regardless of the rhetoric employed in the petition, whether it merely quarrels over the correctness of the factual findings or justification for the discretionary choices, in which case the court would lack jurisdiction, or whether it instead raises a 'constitutional claim' or 'question of law.'" *Ibid.* That is precisely what the court of appeals did in this case. It determined that the essence of petitioner's claim is that the IJ and BIA erred in balancing the equities, which is a challenge to a dis-

cretionary determination that is beyond review. Pet. App. 5a-6a.[5]

b. Petitioner is likewise mistaken in arguing (Pet. 10) that the court of appeals misapplied its decision in *Avendano-Espejo* v. *Department of Homeland Security*, 448 F.3d 503 (2d Cir. 2006). In petitioner's view, that case is inapposite because there, the IJ applied settled law, while here, the IJ "formulat[ed] and use[d] an erroneous standard." Pet. 11. As explained above, the IJ did not formulate a new legal standard in this case. See p. 10, *supra*. And, as the court of appeals correctly recognized, *Avendano-Espejo* was highly relevant because the alien there, like petitioner, disagreed with the IJ's balancing of the equities and attempted to manufacture federal-court jurisdiction by claiming "that the IJ applied an excessive and erroneous legal standard * * *, thereby depriving [the alien] of his due process right to a full and fair hearing." 448 F.3d at 505 (internal quotation marks omitted). The decision below is thus consistent with *Avendano-Espejo*.

3. Finally, petitioner contends (Pet. 6, 10) that the court of appeals' decision "conflicts with the spirit of" *INS* v. *St. Cyr*, 533 U.S. 289 (2001). In *St. Cyr*, this Court held, *inter alia*, that Section 212(c) relief is available for aliens "whose convictions were obtained through plea agreements and who, notwithstanding

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[5] Petitioner also claims (Pet. 8) that the court of appeals incorrectly limited the phrase "questions of law" to "mean only 'matters of statutory construction,'" but the opinion below makes clear that the court did no such thing. As explained, the court of appeals' determination that it lacked jurisdiction over his appeal was based not on petitioner's failure to present a specific issue of statutory construction, but on his failure to present any colorable constitutional claim or question of law. Pet. App. 5a-6a.

those convictions, would have been eligible for § 212(c) relief at the time of their plea under the law then in effect." *Id.* at 314-326. There is no dispute regarding whether Section 212(c) relief is available in this case, and the court of appeals' holding thus presents no conflict with *St. Cyr*.

Petitioner claims (Pet. 10) that the court of appeals' affirmance of the BIA's decision to "cut[] off" or "freez[e]" the equities at the time petitioner's removal proceedings commenced is inconsistent with *St. Cyr*. That contention is mistaken, both because the BIA and IJ did not adopt the legal rule petitioner claims, see pp. 10-11, *supra*, and because *St. Cyr* addressed an alien's statutory eligibility for Section 212(c) relief, not how the Attorney General was to balance the equities involved once an alien was determined to be eligible for such relief. *St. Cyr*, 533 U.S. at 314. Further review of petitioner's claim is therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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